No. 11265.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Berlin Hill,

Appellants,

vs.

Flora B. Hill, Joseph Hill, also known as John A. Hill, Patricia Hill Harris and The Northwestern Mutual Life Insurance Company,

Appellees.

APPELLANTS' OPENING BRIEF.

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No. 11235.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

Peter B. Hill, Joanne Hill, also known as Joan A. Hill, Patricia Hill Harder and The Northwestern Mutual Life Insurance Company,

Appellees.

APPELLANTS' OPENING BRIEF.

Statement Showing Jurisdiction.

Complainant's bill of interpleader in the District Court alleged that complainant was an insurance corporation under the laws of Wisconsin, and that defendants, all of whom were citizens of California, were making adverse claims to $10,060.10, the proceeds of a certain insurance policy, in the possession of complainant. [R. 2 *et seq.*][1]

These facts were admitted by the answers of all defendants. [R. 10, 14.] The District Court had jurisdic-

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[1]Herein references to pages of the record are designated: R. Italics throughout this brief have been supplied.

tion under 28 U. S. C. A., Sec. 41, Subd. 1, for the matter in controversy exceeded $3,000 and the suit was between citizens of different States.

> *Security Trust & Savings Bank v. Walsh,* 91 F. (2d) 481 (C. C. A. 9, 1937).

This appeal by two of the defendants is from the District Court's final judgment [R. 29, 30] awarding the fund in controversy to the other three defendants. Timely notice of appeal was filed [R. 31], and the appeal was duly perfected. [R. 32 *et seq.*] This Court has jurisdiction under 28 U. S. C. A., Sec. 225, Subd. (a) First, and (d).

Statement of the Case.

On December 2, 1942, appellee, Northwestern Mutual Life Insurance Company, issued to George A. Hill, Jr., its five-year term life insurance policy by which it agreed that "immediately upon receipt of due proof of the death of the insured, if such death shall occur within said five years, Northwestern Mutual Life Insurance Company . . . promises to pay . . . Ten Thousand Dollars" to insured's children therein named as "direct beneficiaries." [R. 36b, 39.]

On January 26, 1944, the insured revoked his prior designation of direct beneficiaries, and designated his wife, Genevieve B. Hill, as "direct beneficiary," and, on the same date, by separate instrument designated his children as "contingent beneficiary." [R. 55 *et seq.*]

The insured died on November 24, 1944. Due proof of death was submitted to and received by the insurance

company. Thereafter, on Janury 2, 1945, prior to payment of the proceeds of the policy, the insured's wife, the direct beneficiary, died. [R. 36b.]

Thereafter appellants, who are the executors of the wife's estate, on the one hand, and appellees, who are the children named as contingent beneficiaries, on the other hand, claimed the proceeds of the policy. [R. 36b.] Because of these conflicting claims, the insurance company filed this interpleader action to obtain an adjudication as to the persons entitled to the proceeds of the policy. [R. 2 *et seq.*]

The facts are not in controversy.

Both answers [R. 10, 14] admitted the allegations of the bill of interpleader [R. 2] including the jurisdictional facts noted above. At the trial the insurance policy was received in evidence [R. 38], as well as a statement of the fact. [R. 36b, 38.] The amount due on the policy, now in the registry of the District Court, is admitted to be $9,796.10. [R. 27.]

The ultimate question is whether appellants, the executors of the wife's estate, or the appellees, children of the deceased, are entitled. While these two sets of claimants are the adversary parties, the solution of this question requires a determination of what was the obligation of the insurance company under its contract with the insured.

The District Court gave judgment for the appellees. [R. 29.] This appeal is from such judgment. [R. 31.]

Specification of Errors Relied Upon.

1. That the District Court erred in interpreting the policy so as to award the proceeds thereof to insured's children (contingent beneficiaries) instead of to the executors of the estate of his wife (direct beneficiary). This erroneous interpretation is stated in par. 7 of the findings of fact [R. 27], and in pars. 1, 2, 3 and 4 of the conclusions of law [R. 28], and in pars. 1 and 2 of the judgment. [R. 30.]

2. That the District Court erred in finding that it was insured's intention to financially provide for and protect by the policy his children (contingent beneficiaries) rather than the creditors, heirs or legatees of the estate of his wife (direct beneficiary) if she should survive the insured but die before receiving the proceeds of the policy. This erroneous finding is stated in par. 7 of the findings of fact. [R. 27.]

These errors were stated in appellants' Statement of Points [R. 68, 69], and will be separately considered in the following argument.

ARGUMENT.

I.

The District Court Erred in Interpreting the Policy so as to Award the Proceeds Thereof to Insured's Children Instead of to the Executors of the Estate of His Wife.

The result produced by the judgment challenges attention.

Insured's wife, the direct beneficiary under the policy, survived the insured thirty-nine days. During that period she made due proof of death to the insurance company. However, payment of the proceeds of the policy to her was not made during such thirty-nine day period. If it had been, it is conceded that she could have kept such proceeds. But having died before she received the proceeds, it is decreed that the proceeds must go to the contingent beneficiaries under the policy.

Such an interpretation of the policy, which as a practical matter made the right to the proceeds depend upon the promptness with which they were paid, should not be accepted unless clearly required by the express terms of the policy.

It is respectfully submitted that such interpretation was not warranted.

(1) The Policy Obligated the Insurance Company to Pay Immediately Upon the Death of the Insured. This Obligation Required That the Person to Whom Payment Was to Be Made Be Ascertainable Immediately Upon the Death of the Insured. This Definite Intent Disclosed by the Terms of the Policy Required That Its Proceeds Be Paid Immediately to Insured's Wife When She Survived Him. All Other Provisions of the Policy Should Be Interpreted in Harmony With This Intent.

The policy begins with a promise to pay the proceeds "*immediately* upon receipt of due proof of the death of the insured" to the direct beneficiary (the insured's widow) [R. 39], unless an election is exercised under the "Special Provisions." [R. 45.]

No such election was exercised. [R. 62.]

The policy was a contract between the insured and the company, and the rights of appellants and appellees are derived solely from such contract.

But in order to pay the proceeds *immediately* upon receipt of such proof, there had to be someone to whom the proceeds could be paid—someone ascertainable *at that time,* not at later time. The obligation to pay *immediately* went hand in hand with an obligation to pay to one who might be *immediately identified.*

Apart from the contract, *i.e.,* the policy itself [R. 39 *et seq.*] as amended by the documents changing the beneficiaries [R. 55 *et seq.*], there is no evidence of the insured's intent.[2] Such intent must be ascertained solely from the terms of the contract.

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[2]The absence of any evidence of the insured's intent, except as disclosed by the language of the policy, is pointed out under point II of this brief.

The contract shows a clear and definite intent that the proceeds of the policy shall be paid *immediately* upon due proof of death *to the insured's widow;* that she shall be vested with a right to enforce the company's promise to pay immediately upon the insured's death and the submission of the required proof.

Any other conclusion would be tantamount to saying that, while the insured intended the policy to be payable *immediately* to his wife, he intended also that *such right might be lost if the insurance company failed to perform its promise to pay immediately;* that he intended that the selection of the beneficiary should in effect rest with the insurance company and depend upon what the insurance company did after his death.

A contract must receive such interpretation as will make it operative, *definite,* reasonable and capable of being carried into effect if it can be done without violating the intention of the parties.[3] Of course the insurance company intended to assume an obligation which was *definite,* not only as to the time of payment, but also as to the person to whom such payment was to be made. It must have been even more important to the insured that he have a contract which specified *definitely* the obligation of the insurance company as to both the time of payment and the beneficiary. Certainly it would be unreasonable to conclude that the insured intended that the proceeds of the policy should be payable to his wife if paid *imme-*

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[3]California Civil Code, Sec. 1643, provides:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

As hereinafter pointed out, the policy in question having been negotiated for and delivered in California [R. 36b], California law must control its interpretation

diately, but that if the insurance company failed to perform its promise for thirty days or six months or three years he intended that some other person might have the proceeds. Certainly there would be manifest inconsistency in concluding that the insured, having made the time when the policy was payable *definite, i.e.,* payable *immediately* upon his death, intended the identity of the beneficiary of such *immediate* payment to depend upon *indefinite* events which might or might not happen over an *indefinite* period after his death at the whim of the insurance company. Such result would make the contract wholly indefinite and unreasonable. Such result would violate the clear and definite intent of both the insured and the insurance company that the proceeds of the policy should be paid *immediately* upon the insured's death to a beneficiary *then* capable of being definitely identified, who in this case was the insured's widow.

The particular clauses of the insurance contract, hereinafter examined, should be interpreted in harmony with this clear and definite intent.[4]

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[4]California Civil Code, Sec. 1650, provides:

"Particular clauses of a contract are subordinate to its general intent."

(2) The Rule of Law, Which Should Be Applied in the Absence of a Policy Provision Clearly Forbidding Its Application, Is That Upon the Death of the Insured a Beneficiary Who Survives Him Acquires a Vested Interest. This Policy Should Be Interpreted in Harmony With This Rule of Law.

Before examining the policy in detail, attention is invited to the law applicable to the vesting of a beneficiary's interest in the absence of any controlling provision in the policy.

The rule is uniform that upon the death of the insured, the interest of the beneficiary becomes a *vested* interest. If the insured does not reserve a right to change the beneficiary, the interest of the beneficiary may be a vested interest from the outset and during the insured's lifetime. But even where a right to change the beneficiary is reserved (as in the instant case), while the beneficiary's interest is contingent or, as is sometimes said,[5] a mere "expectancy" prior to the insured's death, *it becomes a*

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[5]As said in *Blethen v. Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 243 Pac. 431, 434 (1926):

> "The interest of a beneficiary named in a policy in which the insured may change the beneficiary is not a vested right but merely an expectancy of an incomplete and inchoate gift, which is revocable at the will of the insured and which does not become vested as a right until fixed by death."

vested interest when the insured dies without changing such beneficiary.[6]

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[6]In *Andrews v. Andrews,* 97 F. (2d) 485 (C. C. A. 8, 1938) it was said of certain life insurance policies (p. 487):

> "The policies reserved to the insured the right to change the beneficiary. This being true, in the absence of local statute or state decision to the contrary, the beneficiary had no vested right in them until the death of the insured. [Citing cases.] *But when the insured died, without having changed the beneficiary, the rights under the policies became vested.*" [Citing cases.]

In *Nance v. Hilliard,* 101 F. (2d) 957 (C. C. A. 8, 1939), it was said of a life insurance policy (pp. 958, 959):

> "As the policy reserved to the insured the right to change the beneficiary, she [*i. e.* the beneficiary] had no vested interest in the policy, but a mere expectancy. [Citing cases.] *On the death of the insured, however, she became vested with the absolute right of recovery* unless in the meantime a change in the beneficiary had been effected."

In *Zolintakis v. Orfanos,* 119 F. (2d) 571 (C. C. A. 10, 1941), there was a controversy between the insured's administrator and the executor of the beneficiary named in a life insurance policy concerning their right to the proceeds of the policy. The Court said (p. 575):

> *"Upon maturity of the contract the beneficiary therein became vested with a right to the proceeds of the policy and one who denies the right of a named beneficiary to receive the proceeds of a policy has the burden of showing that the beneficiary is not entitled to the fund."*

In *Ex parte Boddie,* 200 S. C. 379, 21 S. E. (2d) 4 (1942), Scott, the insured in a life insurance policy, named his wife as beneficiary, reserving the right to change such beneficiary. The Court said (21 S. E. (2d) at 8):

> "During the lifetime of Mr. Scott the interest of the beneficiary under the policy was a mere expectancy, since the insured had the right to change the beneficiary at his pleasure. No further change having been made during his lifetime, *upon his death the interest of Mrs. Scott ceased to be contingent, and became a vested interest.*
>
> "At that time the situation was that Mrs. Scott had an absolute right to the proceeds of the insurance, subject only to the assignment to the company, which held it as additional and secondary collateral to the real estate mortgages."

In *Freund v. Freund,* 218 Ill. 189, 75 N. E. 925 (1905), the Court, speaking of a policy of life insurance, said (75 N. E. at 930):

It is said that the interest of the beneficiary *"attaches instantly upon the death of the insured."*[7]

> "In the next place, although it may be true that the beneficiary has no vested right in the fund named in the policy during the life of the assured, and has no greater interest than a mere expectancy, *yet, when the assured dies, the beneficiary acquires rights which cannot be cut off, except in the manner prescribed by the contract.*"

In the *Freund* case the assured had sought to change the named beneficiary, assured's son, so as to make his wife beneficiary, but such attempt had not been completed in accordance with the requirements of the policy. In holding that the son (the named beneficiary) was entitled to the proceeds of the policy, the Court pointed out that the "son's interest became a vested one" on the death of the assured before the attempted change of beneficiary was completed.

As said in *Bullen v. Safe Deposit & Trust Co.*, 177 Md. 271, 9 Atl. (2d) 581, 583 (1940):

> "There can be no doubt that a beneficiary in a life insurance policy has no such interest in it, or control over it, as entitles her to say what shall be done with it, or control the change in beneficiaries, or other dealings during the lifetime of the holder of the policy. *It is only after the death of the holder that such interests or rights attach to the proceeds.*"

As said in *Barfoot v. Barfoot,* 245 Ala. 593, 18 So. (2d) 465 (1944):

> "The interests of the named beneficiary in a policy of insurance providing for a change of beneficiary at the will of the insured is a mere expectancy. *The right of a named beneficiary, no change having been made in fact or legal effect, becomes a fixed, vested and legal interest, at the death of the insured.*"

To the same effect see:

Henderson v. Adams, 308 Mass. 333, 32 N. E. (2d) 295, 297 (1941);
Katz v. Ohio Nat. Bank, 127 Ohio St. 531, 191 N. E. 782, 785 (1934);
Harjo v. Fox, 193 Okla. 672, 146 P. (2d) 298, 302 (1944);
Kentucky Home Life Ins. Co. v. Johnson, 263 Ky. 787, 93 S. W. (2d) 863, 865 (1936);
Cooley's Briefs on Insurance, 2nd Ed., p. 6409.

[7]*Knights of Maccabees v. Sackett,* 34 Mont. 357, 86 Pac. 423, 425 (1906).

The foregoing is the law in California.[8]

Since the policy in question was negotiated for and delivered in California [R. 36b], California law must con-

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[8]As said in *Hoeft v. Supreme Lodge K. of H.*, 113 Cal. 91, 45 Pac. 185, 186 (1896):

> "The beneficiary's interest is the mere expectancy of an incompleted gift which is revocable at the will of the insured, and which does not and cannot become vested as a right *until fixed by his death.*"

As said in *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 26 P. (2d) 482, 483 (1933):

> ". . . the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, *vests in the beneficiary at the time of his death;* . . ."

As said in *Supreme Lodge v. Price*, 27 Cal. App. 607, 150 Pac. 803, 807 (1915):

> ". . . upon the death of the assured, no change in beneficiaries having been made, the person named as beneficiary in the certificate, *ipso facto et eo instanti, acquires a vested right to the benefit money.*"

As said in *Mahony v. Crocker*, 58 Cal. App. (2d) 196, 136 P. (2d) 810, 814 (1943):

> "Normally, the interest of the named beneficiary is merely an expectancy of an inchoate gift *which becomes vested upon the death of the insured.*"

As said in *Cook v. Cook*, 17 Cal. (2d) 639, 111 P. (2d) 322, 327 (1941):

> ". . . upon death [of the insured] the beneficiary's right becomes *vested.* . . ."

And again, quoting 27 Cal. App. 607, 623:

> "'. . . the interest of the beneficiary designated in the certificate in the benefit fund *becomes vested, eo instanti, upon the death of the assured.*'"

As said in *Pimentel v. Conselho Supremo, etc.*, 6 Cal. (2d) 182, 57 P. (2d) 131, 132 (1936):

> "We are satisfied that the better reasoning supports the rule adopted by our courts, that *the rights of the beneficiary vest immediately upon the death of the insured and cannot thereafter be modified by action of the insurer.* . . ."

trol its interpretation and a determination of the rights of the parties thereunder.[9]

Presumably this rule as to the vesting of a beneficiary's interest and its general application will not be disputed. But its application in the instant case is denied by appellees because of certain provisions of the policy.

It is submitted that none of the provisions of the policy in this case forbid application of this general rule. Moreover, if there were doubt as to the correct interpretation of the policy, such doubt should be resolved in harmony with the general rule that a beneficiary's interest vests upon the death of the insured.

(3) No Provisions of This Policy Forbid Application of the General Rule of Law That a Surviving Beneficiary's Interest Vests Upon the Death of the Insured.

Parts of the policy which appellees have said forbid an application of the general rule are: Paragraph 11 under the heading "General Provisions" [R. 41 *et seq.*], and certain paragraphs under the heading "Special Provisions Relating to Settlement When This Policy Becomes Payable." [R. 45 *et seq.*] Attention is invited to these provisions.

(A) "General Provisions."

Paragraph 11 of the "General Provisions" [R. 43, 44] is relied upon to sustain the judgment. For convenient reference the five sentences comprising paragraph 11, copied below, are designated (as they were in the argu-

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[9]*Mutual Life Co. v. Johnson,* 293 U. S. 335, 339 (1934); *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202 (1938); *Rosenthal v. N. Y. Life Ins. Co.*, 304 U. S. 263 (1938); *Equitable Life Assur. Soc. v. Arnold,* 27 F. Supp. 360 (Mass., 1939).

ment before the District Court): (A), (B), (C), (D) and (E):

> "(A) Subject to the rights of any Assignee, the Insured (1) may designate one or more Direct Beneficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more Contingent Beneficiaries whose interest shall be as expressed in this Policy; and (3) may change any Direct Beneficiary not irrevocably designated; and (4) may change any Contingent Beneficiary.
>
> "(B) If there be more than one Direct Beneficiary the interest of any deceased Direct Beneficiary, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries unless otherwise directed by the Insured with the consent of the Company.
>
> "(C) Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due.
>
> "(D) If no Direct Beneficiary or Contingent Beneficiary survives the Insured the proceeds of this Policy shall be payable to the executors, administrators or assigns of the Insured.
>
> "(E) No such designation, revocation, change or direction shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this Policy) prior to or at the time this Policy shall become payable, and endorsed hereon by the Company."

We contend that the entire paragraph must be deemed to refer to a period ending with the insured's death—not

to a period after the insured's death. We base this contention on the following grounds:

There can be no doubt that sentences (A), (D) *and* (E) *speak of a time at or before the death of the insured,* as distinguished from a period after the insured's death. Obviously the matters referred to in sentence (A) are things which must occur, if at all, before the insured dies. Sentence (E) obviously supplements sentence (A), and likewise refers to matters which must occur, if at all, before the insured dies. Sentence (D) refers to the time of the insured's death, not to a time after the insured's death, for note the words "survives the Insured." This matter (*i.e.,* survivorship) is to be determined as of the date of the insured's death. Thus the sentence describes that which must occur at the date of the insured's death, not at some date thereafter.

Taken separately and divorced from their context, sentences (B) and (C) are not clear. So taken they may refer either to a period before the insured's death, or to a period both before and after the insured's death. We contend for the former construction.

One sentence should not be divorced from its context. The entire paragraph should be construed as a whole. As already pointed out, sentences (A), (D) and (E) unmistakably refer to a period at or prior to the death of the insured. Sentences (B) and (C) should be given the same construction.

As already pointed out, sentence (D) clearly and unmistakably refers to the time of the insured's death—not to something occurring thereafter. But sentences (B), (C) and (D) are obviously intended to cover an *entire series* of possible contingencies, *i.e.,* a case [see (B)] of

several direct beneficiaries and the death of some but not all of such direct beneficiaries; a case [see (C)] where all direct beneficiaries are dead and contingent beneficiaries survive; and [see (D)] a case where all direct beneficiaries and contingent beneficiaries are dead. If, as must be apparent, it was the purpose of these three sentences to cover an *entire series* of possible contingencies, they should be construed as a whole, and it would certainly be a strange construction to make sentences (B) and (C) refer to a period both before and *after* the insured's death, when it is clear that sentence (D) by its terms cannot by any possibility refer to what may happen *after* the insured's death. If all three sentences are construed so as to refer to a time at or prior to the death of the insured—not to a time subsequent thereto—they present a consistent and logical whole. They should be so construed. Clearly sentence (D) does not and cannot refer to what was to occur after the death of the insured. Sentence (D) makes no provision as to what shall happen when *after the death of the insured* all beneficiaries, direct and contingent, are dead. It is quite illogical to suppose that sentences (B) and (C) were intended to cover a period of time not covered by sentence (D), *i.e.,* to make provision for what might happen *after the death of the insured.*

It was not necessary for the draftsman of these sentences to provide therein for what should happen *after the death of the insured.* Since under the law in the absence of express provision to the contrary a beneficiary's interest becomes a vested interest upon the death of the insured, there was no necessity of stating what should happen if one of several direct beneficiaries should die *after the insured's death,* or if all direct beneficiaries should die (leav-

ing only contingent beneficiaries) *after the insured's death,* or if all direct beneficiaries and all contingent beneficiaries should die *after the insured's death.* Since the direct beneficiary's interest would vest *at the insured's death,* there was no need of stating what would happen if such beneficiary should die *thereafter.* The death of one who already has a vested interest will not impair such interest. It becomes a part of his estate. Before the death of the insured, on the other hand, the interest of a beneficiary under this policy could have been no more than a contingent interest. With respect to such interest it was necessary that provision be made as to what should occur in the event that death removed such beneficiary before the interest vested, *i.e.,* before the death of the insured. This was what paragraph 11 of the policy attempted to do, *i.e., deal with contingencies at or prior to the death of the insured.* At the death of the insured the beneficiary's interest became a vested interest. There was no necessity for any statement as to what would happen in the event of the death of a beneficiary after such vesting, for the law provided the answer.

The conclusion is that all of paragraph 11 must be held to refer to matters which may happen at or prior to the death of the insured. Thus sentence (C) stating that "Upon the death of the last surviving Direct Beneficiary the Contingent . . . Beneficiaries . . . shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due," must be held to state that which takes place upon the death of the direct beneficiary *prior to the death of the insured.* The reference to "unpaid benefits due" is not inconsistent with this conclusion. During the lifetime of the insured there are benefits due from time to time under the policy, *e.g.,*

dividends payable in cash to the beneficiary or dividend accumulations (see paragraph 9 under the "General Provisions" of the policy.) [R. 42, 43.]

This conclusion (*i.e.*, that all of paragraph 11 must be held to refer to matters which may happen *at or prior to the death of the insured*) is further strengthened by observing that all of the other paragraphs in that section of the policy entitled "General Provisions" which contains paragraph 11 deal with situations and contingencies which must arise, if at all, *at or before the death of the insured.*

Therefore *none of paragraph 11 is applicable here where the death of the sole direct beneficiary occurred after the death of the insured.* There being no policy provision forbidding an application of the usual rule as to the vesting of the beneficiary's interest, such usual rule should be held to be controlling. Upon the death of the insured on November 24, 1944, the surviving direct beneficiary, Genevieve B. Hill, acquired a *vested* interest in the proceeds of the policy. Since this interest was a *vested* one, it became a part of the estate of Genevieve B. Hill when she died on January 2, 1945.[10]

Any other conclusion would disregard the law relating to the vesting of a beneficiary's interest and would dis-

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[10]The fact that the policy in this case provided that the insurance company promised to pay the proceeds of the policy "immediately upon receipt of due proof of the death of the Insured" [R. 39], did not change the date of vesting from the date of the insured's death to the subsequent date when proofs of death were submitted to the company.

Staunton v. Provident Life & Acc. Ins. Co., 69 Ohio App. 27, 42 N. E. (2d) 687 (1941).

Moreover, in this case the wife, Genevieve B. Hill, died *after* the proofs of death were received by the company.

regard a proper construction of the terms of the policy. *Any other conclusion would make it possible for the insurance company to change the rights of a beneficiary by simply delaying a payment of the proceeds of the policy.*

(B) "SPECIAL PROVISIONS."

Certain paragraphs of the "Special Provisions Relating To Settlement When This Policy Becomes Payable" [R. 45 *et seq.*] are relied upon to sustain the judgment.

These "Special Provisions" obviously embody *a scheme whereby the insurance contract may be continued in effect and operation after the death of the insured,*[11] instead of terminating upon payment of the proceeds in one sum. If these provisions of the policy are not put in operation, then, upon the death of the insured and payment of the proceeds, the policy ceases to function as a contract and must be surrendered and cancelled.

Now, note the provisions of paragraphs 1 and 1a of these "Special Provisions" [R. 45, 46]:

> "1. The Insured shall have the right, with the privilege of change before this Policy becomes payable, to elect payment of the then net proceeds, in whole or in part, under either Option 'A', 'B', 'C', or 'D', or under two or more of said options."
>
> "1a. If when this Policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries *may* make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries

[11]Note that paragraph 13 of these "Special Provisions" states that "During settlement under the Special Provisions this Policy shall remain in the possession of the beneficiary or beneficiaries thereunder" [R. 52].

> the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficiary or Beneficiaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made."

The insured in his lifetime made no election with respect to optional benefits under paragraph 1.

Upon the death of the insured, his wife made no election under paragraph 1a. [R. 62.]

But her failure so to do did not waive or forfeit the *right* which she had upon the death of the insured. Her failure so to do did not place her in the position of losing the proceeds of the policy if she should happen to die before they were paid to her by the insurance company.

By paragraph 1a the wife was given an "election." This means that *two* choices must then have been open to her. One of these choices was to do nothing (as she did) and stand upon her right not to continue the policy in effect but to take "payment in one sum." The other choice was to elect to continue the policy in operation and select an optional method of payment. *By the express language* of paragraph 1a she was permitted to select an optional method of payment *"in lieu of payment in one sum."* The words *"in lieu of"* mean "in place of," or "instead of," or "in substitution for."[12] Clearly the wife was granted the right to select an optional method of pay-

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[12]*Rutherford v. Oroville Wyandotte Irr. Dist.*, 218 Cal. 242, 22 P. (2d) 505, 508 (1933); *Mass. Bonding & Ins. Co. v. Rutley Const. Co.*, 159 Misc. 392, 287 N. Y. Sup. 662, 666 (1936); *S. E. Hendricks Co. Inc. v. Thomas Pub. Co.*, 242 Fed. 37, 42 (C. C. A. 2, 1917); *State v. Minneapolis & St. L. R. Co.*, 204 Minn. 250, 283 N. W. 244, 245 (1939).

ment *in substitution for some right she already had.* As said in *Vancleave v. Wolf,* 98 Ind. App. 650, 190 N. E. 371, 372 (1934):

> "'*In lieu of*' implies the existence of something for which a substitution is being made."

What was the right which the wife already had, *"in lieu of"* which she might have elected to continue the policy in operation and avail herself of its optional benefit features?

Since the insured died without electing to put the optional benefit features of the policy in operation, the policy upon his death, in the absence of any act by his wife selecting an optional feature, became payable *"in one sum."* In the absence of some act by his wife, the policy could not continue in operation. There was nothing left for the insurance company to do but to pay over the proceeds "in one sum." The surviving wife had this right upon the insured's death. This was the right *"in lieu of"* which she might have elected to continue the insurance contract in operation for the purpose of availing herself of one of its optional features. She made no such election. She stood upon the right she had when the insured died, *i.e.,* the right to take the proceeds of the policy "in one sum."

Paragraph 1a declares that if the wife had elected to avail herself of the optional features "the interest of any Contingent Beneficiary designated by the Insured shall terminate." The reason for this is found in the next sentence, which reads: "The Direct Beneficiary . . . may then, subject to change, designate a Contingent Beneficiary . . . under the election so made." Thus, if the wife had elected to avail herself of the optional fea-

tures, she would have been empowered to designate a new contingent beneficiary. If the wife had made such election, *the policy would have continued in force and in operation*, and to avoid conflict between the contingent beneficiary *selected by the insured* and a new contingent beneficiary *selected by the wife*, it was natural that any claim by the former should be barred by the clause: ". . . upon such an election . . . the interest of any Contingent Beneficiary *designated by the Insured* shall terminate." The sole purpose of this clause was to clear the way for a free exercise by the wife of her right to select the optional features.

The foregoing demonstrates the impropriety of construing the clause last referred to *as an implication* that *in the absence of such election* by the wife, the interest of the contingent beneficiaries would survive. No such election having been made, the policy did not continue in operation, and the "Special Provisions Relating To Settlement" did not become operative. The situation presented in the instant case was not one falling within the scope or purpose of paragraph 1a.

If the wife had elected to avail herself of the optional features of the policy (which she did not), then the policy would have continued in operation. In such event the clause "upon such election . . . the interest of any Contingent Beneficiary designated by the Insured shall terminate" would have been useful in preventing conflict between a claim by any contingent beneficiaries *selected by the insured* and a claim by contingent beneficiaries *selected by the direct beneficiary*. But such clause may not be availed of as an implication that the interest of the contingent beneficiary survived where no such election was made by the wife and the policy did not continue in operation.

Paragraph 5 of these "Special Provisions" [R. 46, 47] obviously has no application to the facts here presented. Neither the insured nor the direct beneficiary elected to continue the policy in operation after the insured's death by putting any of the option features in operation. Yet *the express language of paragraph 5 clearly makes the paragraph inapplicable where the option features have not been made operative.* Note the language in the first sentence following the word "except" *expressly* referring to the option features.

(C) AUTHORITIES.

The following authority on its facts is directly in point, and supports the conclusion that the direct beneficiary, Genevieve B. Hill, at the death of the insured had a vested interest.

In *Chartrand v. Brace,* 16 Colo. 19, 26 Pac. 152 (1891), a policy of insurance on the life of one, Rouse, provided that the proceeds of the policy should "at his death, be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children." Rouse, the insured, died. His wife, Ella, died within a month thereafter. The proceeds of the policy were claimed by the wife's administrator, also by the children of a former wife of the insured who were the "children" named in the policy as contingent beneficiaries.

In affirming a judgment in favor of the deceased wife's administrator, the court said (26 Pac. at 153):

> "A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will. * * * (26 Pac. at 154): So, in the case at bar, we are of the opinion that, by the express terms

of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death, the fund should pass to the administrator as a part of her estate.

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"If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day. *In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if, during the time, the wife should die, others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife in many instances to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be."*

Kottman v. Minnesota Odd Fellows Mut. Ben. Soc., 66 Minn. 88, 68 N. W. 732 (1896)[13] is to the same effect.

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[13]This case was followed in *Free and Accepted Masons v. Johnson*, ... Tex. Civ. App. ......, 56 S. W. (2d) 215, 217 (1932). While the latter involved rights under a certificate issued by a mutual benefit society, it is said that by the weight of authority the rights of a beneficiary under such a certificate do not differ essentially from the rights of a beneficiary under an ordinary life insurance policy. *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, 897 (1914).

There the Society issued to one Gazett a certificate stating that it agreed "to pay, within sixty days after notice and satisfactory proofs of the death of said brother, made as provided by the by-laws, to Mrs. Fride Gazett, his wife, if living, if not living then to the heirs or assigns of the aforesaid brother, a sum," etc. Gazett died on November 12, 1894. Six days later, before any proofs of his death had been furnished, his widow, Fride Gazett, died. The administratrix of the widow recovered judgment against the Society for the proceeds of the certificate. In affirming this judgment the court said (68 N. W. at 733):

> "We have no doubt that the words 'if living' and 'if not living' refer to the time of the death of the member, and that the right of the beneficiary became fixed and vested at that date.
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> * * * * * * * *
>
> "*The law always favors vested in preference to contingent estates or interests.* If defendant's contention is correct, then who is or will be the beneficiary will remain incapable of ascertainment until 60 days after proof of death, or, at least, until proof of death. Until that proof is made, no one would have any vested interest in the fund. Who, then, it may be asked, is to furnish the proof of death? The provision requiring proofs of death is designed solely for the protection of the society, and the 60-day clause is also intended exclusively for its benefit, to give it time to collect an assessment from its members. Neither provision has any reference to the question as to who the beneficiary shall be. These provisions being solely for the benefit of the society, it is competent for it to waive them. Suppose in this case the society had waived proofs of death, and paid

over the money to the widow before she died; would it be contended that the society would be liable to pay a second time to the heirs of Gazett? We fail to see why it would not be if defendant's construction of the certificate is to obtain. *Any such construction is also subject to the serious objection that it leaves the determination of the question who the beneficiary shall be subject to be manipulated and changed by the conduct of the parties after the death of the member, as, for example, by expediting or delaying the furnishing of proofs of death.* We hold that the widow's right to the fund became vested at the date of the death of her husband, and that right was not divested by her subsequent death before proofs of death had been made."

The decision in *Northwestern Mut. Life Ins. Co. v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1941), is not opposed to our contentions.

The *Fink* case arose upon a Northwestern policy somewhat similar to the policy in the instant case. Such policy did not on its face name any beneficiary, but the insured had made the following "designation":

> "I, Edwin A. Wolf, the insured . . . hereby designate Charlotte Wolf and Florence W. Gage, wife and sister, as direct beneficiaries under said policy, share and share alike. In the event of the death of Charlotte Wolf, such share as she would have been *entitled to receive* shall be payable to Virginia C. Wolf and Edwin Wolf, Jr., share and share alike, or to the survivor of them."

There is nothing resembling this "designation" in the instant case. The policy here involved contains nothing of

the sort. The paper designating Genevieve B. Hill simply designates her "as direct beneficiary." In a separate paper, bearing the same date, the Hill children are designated "as contingent beneficiary." Neither paper says anything about what will happen in the event of the death of the direct beneficiary.

In the *Fink* case the direct beneficiary, Charlotte Wolf, died twenty-four hours after the insured. It was held that the one-half interest in the policy which Charlotte Wolf would have taken if living passed to Virginia C. Wolf and Edwin Wolf, Jr. The latter had already been paid by the insurance company, so any other conclusion would have required the insurance company to pay again on the same policy.

The court, in reaching this conclusion, relied solely upon the "designation" (quoted above) which the court said "must be read as a whole" (118 F. (2d) at 763). Clearly the court did not base its conclusion upon paragraph 11 of the policy.

Obviously this "designation" in the *Fink* case spoke of a period *after* the insured's death. It stated that if Charlotte Wolf (the direct beneficiary) died, "such share *as she would have been entitled to receive shall be payable*" to Virginia and Edwin. But until the death of the insured, Charlotte was not and could not have been *"entitled"* to receive anything, for the policy reserved to the insured the right to change beneficiaries. Under the law (see authorities hereinbefore referred to) this gave the direct beneficiary merely an expectancy prior to the in-

sured's death. Until that time she was not *"entitled"* to anything. Hence when this "designation," in connection with Charlotte's death, referred to "such share as she would have been *entitled* to receive," it obviously was speaking of her death after she was *"entitled"* to something, *i.e.,* to her death at a date *after* the death of the insured. Accordingly it is not strange that this "designation" (which has no counterpart in the case at bar) was held to govern a distribution of the proceeds of the policy upon the death of the beneficiary *subsequent* to the death of the insured.

In the case at bar there was no such "designation." Neither the paper which designated the direct beneficiary [R. 55], nor that which designated the contingent beneficiaries [R. 58], nor the policy (paragraph 11) provided for what should happen upon the death of the direct beneficiary *after* the death of the insured. Hence there was nothing to repel an application of the usual rule of law, that upon the death of the insured the interest of the beneficiary becomes a vested interest.

The court mentions another reason for its decision in the *Fink* case, viz., that the direct beneficiary in that case died before she had "perfected" her right to receive the proceeds of the policy, *i.e.,* died before proof of the insured's death was filed with the company (118 F. (2d) at 763). In the instant case, on the other hand, proof of death was made and filed with the company and the policy by its terms had become payable before the death of the direct beneficiary occurred. This is an additional ground for distinguishing the *Fink* case.

II.

The District Court Erred in Finding That It Was Insured's Intention to Financially Provide for and Protect by the Policy His Children Rather Than the Creditors, Heirs or Legatees of the Estate of His Wife if She Should Survive the Insured but Die Before Receiving the Proceeds of the Policy.

The District Court found as a fact that:

"It was the intention of Mr. Hill, the insured, as indicated by the provisions of the said policy and the *surrounding circumstances* under which the policy was issued and the *surrounding circumstances* at the time of the said change of Direct Beneficiary and the designation of the said three children as Contingent Beneficiaries to financially provide for and protect his widow during her lifetime and next his own children, rather than the creditors, heirs or legatees of the estate of his widow if she should survive the insured and then die before receiving the benefits due or to become due under the said policy." [R. 27.]

The District Court in its memorandum entitled "Conclusions of the Court" said:

"*To more certainly evaluate the meaning of the policy* in suit as it pertains to those named therein as beneficiaries, consideration should be given to the insured's natural propensity to financially provide for and protect his widow during her lifetime, and, next, his own children, rather than her relations or creditors. He unmistakably manifested this attitude by primarily naming his children as sole beneficiaries of

the policy, and upon realizing later conjugal obligations, substituting his wife as direct beneficiary but still regardful of his children's welfare also, he simultaneously named them contingent beneficiaries." [R. 19.]

Thus, in interpreting, or, as the District Court says "to more certainly evaluate the meaning of," the policy a finding as to the insured's *actual intent* is thrown into the scales against appellants. It is true that the District Court also expressed the opinion that the terms of the policy itself warranted a conclusion adverse to the appellants. [R. 20.] Nevertheless, since this finding as to the insured's *actual intent* is stated in order to "more certainly evaluate the meaning of the policy," it must have had potency in influencing the District Court's interpretation of its provisions.

This finding was wholly unsupported by the evidence. It rests solely upon conjecture.

It appears that the policy as originally issued on December 2, 1942, named the insured's children as sole beneficiaries. [R. 39.] On January 26, 1944, the insured changed the beneficiary designation so as to make his wife the direct beneficiary and his children the contingent beneficiaries. [R. 55, 58.] *There was no evidence disclosing the reason for this change. The record does not disclose any of the "surrounding circumstances" referred to in this finding.*[14]

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[14]The trial proceedings, except for argument, were very brief, and have been printed in full in the Transcript of Record, pp. 37, 38, 62, 63, 64, 65 and 66. The only other facts before the District Court were those found in the statement of fact [R. 36b], and the admissions of the pleadings.

To find that this change was made by the insured to make the policy financially provide for and protect his children if his wife should survive him but die before receiving the proceeds of the policy, was to assume facts and conditions of which there was not the slightest hint in the evidence. An inference of fact must at least have a predicate in fact. The change of beneficiaries in 1944 may just as naturally be attributed to a desire that insured's wife should have the proceeds of the policy if she survived him, as to a desire that she should have such proceeds *only if she survived him long enough to receive them.*

Moreover, it seems to be conceded that the wife would have been entitled to the proceeds of the policy if she had made an election under paragraph 1a of the "Special Provisions." Yet this is wholly inconsistent with the supposed intent of the insured as stated in this finding. The finding states that it was insured's intent to protect his children if his wife died before receiving the proceeds of the policy. This could not have been his intent because under the policy, even if the wife died before the proceeds were paid, the same would pass to her estate for the benefit of her creditors, heirs or legatees if, after the insured's death but prior to her death she had made the election under paragraph 1a. It could not have been the insured's intent that his wife should take the proceeds of the policy only if she survived him long enough to receive them from the company, for the policy itself provided her with a ready means of defeating such intent by immediately upon the insured's death electing an optional benefit feature under paragraph 1a [R. 45, 46] thereby terminating (according to the express language of paragraph 1a) the interest of the contingent beneficiaries.

The District Court's finding as to the insured's *"intention . . . as indicated by . . . the surrounding circumstances* under which the policy was issued and the *surrounding circumstances* at the time of said change of Direct Beneficiary" was wholly without evidentiary support, and must be disregarded.

It was not the intent of the insured to give his wife the proceeds of the policy (a) only *if she survived him long enough to receive such proceeds from the company,* and (b) only *if she failed to take action under paragraph 1a before she died.*

The insured's intent was that his wife should have a vested right to the proceeds if she survived him, such right to be unaffected by the promptness of the insurance company in paying the policy, or by his wife's affirmative action after his death.

It is respectfully submitted that the judgment of the District Court should be reversed and the proceeds of the policy awarded to the executors of the estate of Genevieve Borlini Hill, deceased.

April 17, 1946.

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